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No. 1586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY of Brooklyn, New York, (a corporation),

Plaintiff in Error,

vs.

LEON WILLARD, doing business under the firm name of LEON WILLARD & CO.,

Defendant in Error.

PETITION FOR REHEARING.

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Attorney for Petitioner.

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Plaintiff in error respectfully requests that the decision of this Court affirming the judgment of the lower Court in favor of defendant in error be set aside in order that there may be a re-argument of the case. In support of this application we submit the following.

An analysis of the decision discloses that the reasoning of the Court upon which the affirmance is based is as follows:

1. That the words "occasioned" and "caused" are synonymous.

2. That "by" and "through" are words meaning the same thing.

3. That the word "directly" as a qualifier of "caused" is equivalent to "on the insured premises":

4. That if A start a fire at a given point and property at such point is burned by such fire then as to that property the loss is directly caused by A, but that as to property burned through the spreading without new or intervening agency of such fire to another point A is only the indirect cause of the loss.

And from these premises the Court draws the conclusion that the word "directly" must be read into the exemption clause after the word "occasioned" preceding the phrase "by earthquake"; and that, therefore, the insurer is exonerated from liability only in those cases in which the excepted peril "earthquake" causes a fire on the insured premises.

We respectfully submit that each premise upon which the conclusion of the Court is predicated is without sound basis, and that the whole course of

reasoning by which the scope of the earthquake exemption is thus limited is illogical and without support either in principle or authority.

In maintaining these propositions plaintiff in error contends and submits:

1. That the words "occasioned" and "caused" in their plain, ordinary and popular sense are not synonymous, but even if they be synonymous under the rule of construction upon which the decision rests, they must for the purposes of this case be given different meanings.

2. That the words "by" and "through" have entirely different meanings, and cannot be held to mean the same thing unless a cardinal rule for the construction of contracts is wholly ignored.

3. That the word "directly" is not equivalent to "on the insured premises" but means exactly the same thing as "proximately".

4. That Walker v. London & Provincial Ins. Co., 22 Irish Law Times, 84, although sought to be distinguished by this Court is not distinguishable and is opposed to the ruling made.

5. That the decisions of the federal Supreme Court in the Tweed and Boon cases have been misconstrued by the Court.

6. That Hustace v. Insurance Company, 125 N. Y. 232 and German Fire Insurance Company v. Roost, 45 N. E. 1097, have been misunderstood.

7. This Court was misled by the erroneous statement of defendant in error as to the ruling in Michigan F. & M. Insurance Company v. Whitelaw, 25 Ohio Cir. Ct. 197.

8. Standard Life & Accident Ins. Co. v. McNulty, C. C. A. 8th Circuit, 157 Fed. 224, in which the ruling is just the reverse of that in this case is not noticed in the opinion, and plaintiff in error asks that that case be again considered, and, if the Court shall be of the opinion that the reasoning of Judge Sanborn is unsound that its views to that effect be expressed.

I.

THE WORDS "OCCASIONED" AND "CAUSED" IN THEIR PLAIN, ORDINARY AND POPULAR SENSE ARE NOT SYNONYMOUS; BUT EVEN IF THEY BE SYNONYMOUS UNDER THE RULE OF CONSTRUCTION UPON WHICH THE DECISION RESTS, THEY MUST FOR THE PURPOSES OF THIS CASE BE GIVEN DIFFERENT MEANINGS.

We do not question the proposition that words in a contract are to be construed in their "plain, ordinary and popular sense", but we do question the doctrine for the first time announced in this case that we are not to look to lexicographical definition to ascertain what such sense is. If the sense of a word, "plain, ordinary and popular" and otherwise is not to be determined by the defini-

tions thereof found in the dictionaries how is it to be ascertained? Whoever heard of taking testimony as to the usual and ordinary meaning of an English word? And upon what theory may a judge, or a bench of judges judicially say that such meaning is other or different from that found in the standard dictionaries? It is true that the Court cites Imperial Insurance Company v. Coos County, 151 U. S. 452 as supporting its ruling upon this point but we find nothing to that effect in that case, and no mention therein as to "lexicographers" or "those skilled in the niceties of language". What the Supreme Court did say was:

> "When an Insurance Contract is so drawn as to be ambiguous or to require interpretation, or to be *fairly* susceptible of two different constructions, so that *reasonably* intelligent men, on reading the contract, would *honestly* differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. But the rule is equally well settled that contracts of insurance, *like other contracts,* are to be construed according to the sense and meaning of the terms which the parties have used, *and, if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense".* (Italics ours).

We respectfully submit that this language not only furnishes no base for the statement in the opinion of the Court as to what was in fact decided by the Supreme Court but just the reverse.

In defining a word lexicographers give first, the primary, plain, ordinary and popular meaning thereof; then, if such word has a peculiar technical meaning when applied to a particular subject matter, such meaning is thereafter also given.

In the preface to the encyclopaedic dictionary the authors say with relation to the plan of this work:

> "Verbs, for instance, are first divided into transitive and intransitive. * * * The transitive and intransitive divisions are next divided as follows: firstly, into meanings used in *ordinary language;* and secondly, into technical senses". *And the definition "firstly" given to the word "occasion" by this authority is, "to cause directly or indirectly".*

The only thing that the rule that words in a contract are to be understood in their plain, ordinary and popular sense can possibly contemplate, is that words are to be given their primary meanings as stated by the lexicographers, rather than their special technical meanings, unless it is clear from the context that the parties have used them in a special technical sense.

But the word "occasion" has no technical meaning at all and its primary definition is "to cause "incidentally or indirectly; to cause directly or "indirectly". Notwithstanding this fact the Court has, in effect, held that its plain, ordinary and popular meaning shall not be given to it.

The Supreme Court of the United States has recognized that the lexicographers are to be resorted to in order to ascertain what the "plain, ordinary and popular" meaning of a word is. In *Mutual Accident Assn. v. Barry,* 131 U. S. 100, the Court said:

> "The term 'accidental' was used in the policy in its ordinary, popular sense as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected.'"

And in thus defining the word "accidental" the Court gave the identical meaning to this term that is given to it by the first definition of that word in the dictionaries.

Again in *Nix v. Hedden,* 149 U. S. 304, the Court referred to the dictionaries to determine the plain and ordinary meaning of "fruit" and "vegetables".

In *Koechl v. United States,* 84 Fed. 448, Judge Lacombe recognized the rule that the first definition of a word given in the dictionaries is the popular meaning thereof, when he said:

> "The importers cite the Century Dictionary, which, after giving the correct definition of 'vaccine', both as adjective and noun, sets forth as a *secondary* definition of the word", etc.

He refused to consider such secondary meaning.

That the plain, ordinary and popular meaning of a word is that given to it by the lexicographers appears from the statement of Mr. Justice Daniel in *Maillard v. Lawrence,* 16 How. 251, where he says:

> "The effort has been to substitute for the literal and *lexicographical and popular* meaning of the phrase 'wearing apparel' some supposed mercantile or commercial significance of these words";

and he held that this could not be done.

In *Rich v. Parrott,* Fed. Case No. 11760, Clifford, Circuit Justice, says: "Words are to be " construed according to their *primary acceptation*".

In the face of these authorities it is difficult to understand how the word "occasioned" can be given any other meaning that that of "caused direct- " ly or indirectly or caused incidentally", this being the primary meaning of that word as given by the lexicographers.

Upon reading the opinion, the soundness of which we are questioning, it would seem that we have contended that the word "occasioned", found in the policy in suit, should not be given the meaning which that word expresses when taken and understood in its plain, ordinary and popular sense. We have certainly contended for just the reverse of this proposition, and that the plain, ordinary and popular sense of the word is to be found in the dictionaries to which we next refer.

"To occasion" is defined by the Century Dictionary: "(1) to cause incidentally, or indirectly."

Webster defines it "(1) to cause incidentally". The Encyclopaedic Dictionary defines it as "(1) to " cause directly or indirectly".

In Crabb's Eng. Syn. it is said:

> "What is caused seems to follow naturally; what is occasioned follows incidentally; a wound causes pain; an accident occasions delay; the misfortunes of the children cause great affliction to the parents; business occasions a person's late attendance at a place."

The noun "occasion" is defined by the Encyclopaedic Dictionary as "an incident; an event or casualty which gives rise to something else; an incidental but not efficient cause; an indirect or incidental cause or origin."

And the courts have held that the verb "occasioned" has a broader meaning than "caused" and that in such broader sense it contemplates the idea of indirectness of action.

Words and Phrases Judicially Construed, Vol. 6, p. 4896;
Curry v. Chicago, etc., R. R. Co., 43 Wis. 665;
Meysenberg v. Schlieker, 48 Mo. 426;
Pennsylvania Co. v. Congdon, 33 N. E. 795;
Cleveland v. City of Bangor, 32 Atl. 892 (Me.);
Parker v. Boston & M. R. R. Co., 3 Cush. 107.

It is to be noted that in the policy in suit the phrase "caused directly or indirectly" measures the exemption from losses to be brought about by

wholly human agency, to-wit.: invasion, insurrection, riot, civil war, etc., while as to the phrase "occasioned by or through" the exemption is from losses which may be brought about by some convulsion of nature, to-wit.: volcano, earthquake or hurricane, *or other* eruption, convulsion or disturbance. It was evidently in mind that as to these last named perils losses might be caused by them or might come about through them; might be caused either directly or indirectly by them, or, that conditions might be brought about which would furnish an occasion through which losses might result. Turning to the Standard Dictionary of the English Language we find the verb "occasion" defined thus: "to cause or bring about by furnishing the condition or occasion needed for the action of a particular cause; to cause accidentally or incidentally, or simply to cause or bring about; to furnish inducement for; lead to or necessitate".

And in this definition we find the reason for the use in the policy, as applied to the class of perils named, of the phrase "occasioned by or through". Is it not apparent then that the reason for changing from caused directly or indirectly in the first subdivision of the exemption clause into occasioned by or through in the second subdivision was not for the purpose of narrowing the exemption but in order that the phraseology in each case should more fitly apply to the class of perils to which the language was intended to relate. And finding as we do that

the verb "occasioned" is given the meaning "to "cause directly or indirectly", *or incidentally,"* and therefore has, standing alone, a more extended signification than the phrase caused "directly or indirectly", what possible justification is there for saying that the intention was that it should have a narrower one? And is it not apparent that in still further widening the expression into "occasioned "by or through" the intention was to give to the exemption the fullest possible effect?

It is true that in the opinion it is said that by and through mean the same thing. But this, as we show conclusively further on, is not so, and furthermore even if so, under the rule upon which this Court bases its judgment it is absolutely necessary that some difference in the meaning of these two words should be found.

The Court finds the difference between the two phrases "caused directly and indirectly" and "occasioned by and through" by first giving to the word through the same meaning as by, for which there is, we submit, no justification, and then giving to the verb "to occasion" the sense in which it is used as a synonym of the verb "to cause" without regard to the fact that its primary meaning is not synonymous with the latter. In other words the Court finds the difference as to the effect intended by giving to the verbs "caused" and "occasioned" the one meaning in which they concur rather than

in looking for that difference in the varying meanings which exist between them. We respectfully submit that this is wholly illogical. And we also submit that the rule is otherwise and that where different words, having ordinarily the same meaning, are used in different parts of a policy of insurance with reference to similar kinds of subject matter, by using such different words the intent must have been to use them in different senses. This rule is announced by Lord St. Leonards in *Anderson v. Fitzgerald,* 4 H. L. C. 512, where he says:

> "Now, when I find that the contract uses, to express the same thing, two words which may indeed have the same meaning, but which are also open to different senses, I must be very well satisfied before I apply the same construction to those two words, that such was the intention; for if a proper word is used, and then afterwards a word is used which admits of a different as well as of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used (or else why not repeat the first word?) but to use it in a different sense".

The earthquake exemption clause must be read in this way if we are to give to the verb "to occasion" the primary definition thereof found in the dictionaries, and to do otherwise, is, we submit, to create an ambiguity which does not exist.

In view of what has been said we submit that the exemption clause must be construed as reading

"shall not be liable for loss caused directly or in-
" directly by invasion; or for loss caused directly
" or indirectly *or incidentally* (i. e. occasioned) by
" *or through earthquake*".

And the views expressed in our briefs, which if considered are not noticed in the opinion, is, we think conclusive against the construction put upon the policy by the Court. We refer to the argument based upon the use of the word occasion in that portion of the exemption clause which provides that the company shall not be liable "beyond the actual
" value destroyed by fire for loss occasioned by
" ordinance or law regulating construction or repair
" of buildings, or by interruption of business, man-
" ufacturing processes, or otherwise". Here we have a case in which the loss can only result indirectly from the excepted cause, and the verb to occasion is used to exempt from liability for such indirect loss.

When a fire damages a wooden building to a certain extent but not sufficiently to constitute a total loss, but by reason of an ordinance which forbids the repair or construction of wooden buildings, such building cannot be repaired, the insurer, in the absence of an exception covering such a loss, is liable not only for the damage by fire but also for the additional loss suffered by reason of the insured

not being able to repair; such additional loss being considered a loss by fire.

> Hewins v. Insurance Company, 68 N. E. 62 (Mass).

And loss of such character cannot be properly said to be "caused" by the ordinance. Loss in such a case is "occasioned" by the ordinance, by the indirect action thereof in forbidding the owner to repair his building.

Interruption of business or manufacturing processes cannot cause a loss to the insured; it constitutes merely a condition or situation which incidentally or indirectly results in loss.

> "Where injunctions caused delay and the delay resulted in loss the loss was "occasioned" by the injunctions, though they might not be the direct cause of the loss".
>
> Meysenberg v. Schleiper, 48 Mo. 426, 434.

Or to apply the distinction announced in the case last cited to the clause of the policy now under consideration: "Where an ordinance forbids the "repair of a building and such inhibition results "in loss, the loss is 'occasioned' by the ordinance "although it is not the 'cause' thereof".

Having therefore expressly used the verb "occasioned" in a provision of the policy in a sense expressive of indirectness of action, by this fact alone the parties must be held to have contemplated that the verbs "caused" and "occasioned" were not

used as synonymous terms but that each word should be given the distinct meaning which it has when used in its "plain, ordinary and popular sense".

In point as to this is *Saunders v. Clark*, 29 Cal. 299, 305, in which case Judge Sanderson said:

> "Where it is apparent that the parties to a contract have attached to certain words or expressions a particular meaning, it must be presumed, nothing to the contrary appearing, that the same meaning was intended wherever like words or expressions are subsequently employed".

It is also to be noticed that in that portion of the exemption clause last referred to and where the excepted peril has relation to a human agency we have "occasioned by" instead of "occasioned by or through", accentuating the proposition that in exempting from loss occasioned "by *or through*" earthquake there was the understanding that "through" was not a mere repetition of "by". Under the rule upon which the Court rests its decision it must, we submit, be conceded that error has been committed in holding that "by" and "through" in the earthquake exemption clause mean the same thing. Unless the rule is to work only when it can be applied against the company there is, we submit, no escape from this conclusion.

II.

THE WORDS "BY" AND "THROUGH" HAVE ENTIRELY DISTINCT MEANINGS. THEY CANNOT BE HELD TO MEAN THE SAME THING UNLESS A CARDINAL RULE FOR THE CONSTRUCTION OF CONTRACTS IS WHOLLY IGNORED.

An obvious inherent weakness in the process of reasoning by which the conclusion announced in this case was reached, is found in the fact that, while adopting a particular rule of construction for the interpretation of the exemption clause, the Court applied that rule in order to create an ambiguity, but refused to apply the same rule to explain the ambiguity thus created.

To state it briefly, the rule announced is that "a change in phraseology shows an intent to change the meaning". The Court applied this rule to the change in phraseology consisting in the insertion in the invasion clause of the qualifying phrase "directly or indirectly" and the omission of that phrase in that part of the exemption clause relating to earthquake. But the Court not only refused to apply the same rule to the change in phraseology consisting in the change of the causative verb from "caused" in the invasion clause to "occasioned" in the earthquake clause, but also refused to give any effect to the change from the preposition "by" in the invasion clause to the phrase "by or through" in the earthquake clause.

If there is any logical reason why the rule of construction announced by the Court should not be

applied with equal force to all changes in phraseology occurring in the exemption clause, it does not suggest itself to us, nor does the Court in its opinion give any reason by way of justification therefor. While experiencing no difficulty in finding a significant distinction in meaning on account of the *absence* of the phrase "directly or indirectly" from the earthquake clause, it cannot see the same significance in the *presence* of the preposition "through" in that clause. It says that it does not find any enlargement of the meaning of the clause from the use of the words "by or through", and that such phrase is but the repetition of words meaning the same thing. But the Court does not give any reason for this statement, and we submit that no reason therefor can be given.

In thus brushing aside this subsequent change in phraseology consisting of the addition of the preposition "through" to the earthquake clause, the Court has disregarded the fundamental rule for the construction of written instruments, that every word contained in a writing must be given effect.

Said Mr. Justice Strong in *Washington Market Co. v. Hoffman,* 101 U. S. 115: "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, it was said that 'a statute

ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'; this rule has been repeated innumerable times".

And the same rule, applicable to the construction of statutes, is alike applicable to all written contracts, including policies of insurance.

> Yoch v. Insurance Company, 111 Cal. 503; Griffing Co. v. Insurance Company, 68 N. J. Law, 368.

It was said by Lord Ellenborough in *Robertson v. French,* 4 East. 135: "The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance".

And to the same effect see

> Ins. Co. v. Kearney, 180 U. S. 132.

In American & Eng. Enc. of Law, (2nd ed.) Vol. 17, p. 7, the rule is stated as follows:

> "What may be considered another aspect of the rule that the instrument shall be considered as a whole is the requirement that every clause and even every word shall be given effect, if this is in any way possible, and no part will be rejected unless absolutely repugnant to the general intent".

In Jones on Construction of Commercial and Trade Contracts, Sec. 210, the author says:

> "It does not, however, need argument to sustain it, for to disregard certain portions of the contract and to exclusively follow others when

> the object to be attained is the discovery of the intent of the parties to the entire contract, would be *apparent folly*".

The earthquake clause in the policy in suit reads, " shall not be liable for the loss or damage occa- " sioned by or through earthquake". It cannot be denied that to the most ordinary mind this expression is equivalent to "occasioned *by earthquake or " through earthquake*". Can it then be held, under the rule of construction that no word in a writing can be rejected as surplusage, if it can be given a meaning, that the Court must seek to give these words the same meaning, if they can possibly be given different meanings? Manifestly the two words "by" and "through" must be given different meanings, for, even although such words may sometimes have the same meaning, if they may also have different meanings, then when both words are used some difference in meaning must have been intended.

Anderson v. Fitzgerald, supra.

And under the very rule of construction upon which the decision of the Court is based the significant change from "by" in the invasion clause to "by or through" in the earthquake clause shows that some change of intention was contemplated.

The prepositions "by" and "through" as used in the exemption clause are used in connection with causative verbs, and when so used they *may* not

only express different ideas but they cannot express the same idea.

When used in connection with a causative verb the preposition "by" serves the sole purpose of *naming* the agent which produces the immediate effect. The preposition "through", on the other hand, when used with a causative verb, not only names the causative agent, but, in addition to this, expresses the idea that the result was produced by means of or through the instrumentality of the agent named, and that such result was produced by such agent's operating through other agencies.

This distinction is clearly pointed out by the Encyclopaedic Dictionary which gives the single definition to the word "by", when used as a preposition to express causation as follows: "By, "Causation: Noting the cause by which an effect "is produced". And giving as an illustration: "Fissures near Serocarne, in Calabria, caused *by* "the earthquake of 1783, Lyell: Prin. of Geol. Ch. "XXIX".

The single definition of the preposition "through" when used to express causation is given by the same authority as follows:

"By the instrumentality, medium or agency of; "by means of".

The Standard Dictionary expresses this difference between the two prepositions when used with a causative verb, as follows: "*By* refers to the agent;

through, to the means, cause or condition * * * *Through* implies more distant action than *by* or with, and more intervening elements".

It is thus clearly shown that the use of the word "through" with a causative verb implies more intervening elements than does the use of the word "by" with the same kind of verb; the expression "caused through earthquake" expresses exactly the same idea as "caused indirectly " by earthquake".

This distinction in meaning between the two prepositions "by" and "through" is not arrived at by dealing with the "niceties of language"; on the other hand, the distinction is apparent to even the common and ordinary mind. This may be illustrated in connection with the earthquake of April 18th, 1906. If one should say that San Francisco was destroyed *by earthquake,* a common and ordinary mind would at once be impressed with the idea that the city had been destroyed by the action of the earthquake in throwing down buildings, etc.; but if one should say, on the other hand, that San Francisco was destroyed *through* earthquake, the mind would be impressed with the idea that the city had been destroyed, not by the act of the earthquake in throwing down buildings, but on account of the earthquake's having set other agencies in motion, such as fire.

That the word "through" expresses the idea of indirection may be also illustrated in the following

way: If one says one went *by* a city, the idea would be conveyed to the mind that the person speaking had merely passed the city without entering into it at all; on the other hand, if one should say that one went *through* a city, the idea conveyed would be that the person speaking went into the city and in and about the streets thereof.

Can it then be said, in the face of these essential differences between the two words, that "by" and "through" mean the same thing? Even if it could be said, which it cannot, that in arriving at these distinctions in meaning we are dealing with the "niceties of language", nevertheless, both these words having been used, distinctions in their meaning must be sought for, and if such distinctions can possibly be found the two words cannot be given the same meaning.

This must follow under the rule announced by this Court that a change in phraseology indicates an intention to change the meaning; it must follow under the ruling in Anderson v. Fitzgerald, supra, that when two words are used in a contract which have the same meaning, but may have also a different meaning, they must be each given a different meaning; it must follow under the ruling of the Supreme Court in Washington Market Co. v. Hoffman, supra, that every word in a contract must be given effect. Under all authorities rules, therefore, if a difference in meaning can be found between the words "by" and "through", such different mean-

ing must be given to these words. And as the word "through" cannot mean less than "by", but when used with a causative verb can only be more comprehensive than "by", "through" must be given a broader meaning and be held to express indirectness of action. The whole clause then is equivalent to "shall not be liable for loss caused " directly or indirectly by invasion; or for loss " caused directly or indirectly or *incidentally* (i. e. " occasioned) by, or *by the instrumentality, medium " or agency, or means of* (i. e. through) earth- " quake". And yet this Court says: "the natural " inference is that the intention was to claim a *nar- " rower* exception from liability in the 'earthquake " clause' ".

We respectfully submit that this is a case in which it may properly be said that "the construction given by the Court to this clause of the policy appears to be cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words it contains in their plain, ordinary and popular sense".

McGlother v. Provident Mutual Accident Co. (C. C. A. 8th Cir.) 89 Fed. 685, 689.

III.

THE WORD "DIRECTLY" IS NOT EQUIVALENT TO "ON THE INSURED PREMISES" BUT MEANS EXACTLY THE SAME THING AS "PROXIMATELY".

The Court says that "the second exception exempts only from liability for loss by fire which is caused directly by volcano, earthquake, etc., and that a loss indirectly caused by the progress of a fire from a distance, although originally started by an earthquake, is not within the exemption". And thereafter in its opinion the Court says that the earthquake "was not nevertheless the direct cause. It did not produce a fire on the insured premises".

The Court holds that where a fire is started by an earthquake and thereafter spreads through combustible material, then somewhere along the line in the progress of such burning the earthquake ceases to be the direct cause of the fire and becomes the indirect cause thereof. Now, where is this point along the line of the spread of the fire where the earthquake ceases to be the direct cause and becomes the indirect cause? To use the illustration given by us in our opening brief; suppose a case where the earthquake starts a fire at one edge of a forest by knocking over a lantern and such fire spreads from one tree to another through, say, one thousand trees, then where does the earthquake cease to be the direct cause and become the indirect cause of the fire which destroys the one thousand trees? Is it in the

first tree or in the tenth tree or in the hundredth tree? The impossibility of logically discovering any point in the line of the fire where the peril causing such fire ceases to be the direct cause and becomes the indirect cause thereof is admirably shown by Christiancy, J., in *Hoyt v. Jeffers,* 30 Mich. 181, where he says with relation to the liability of a defendant for negligently starting a fire:

> "If we are to refine upon questions of this kind, in defiance of practical common sense, the defendant's liability might just as well, upon strict scientific principles, be confined to still narrower limits. The argument is, that though defendant may be liable for the loss of the particular building first set on fire through his negligence, and such others as are in actual contact with it, yet his liability cannot be extended to others not in such actual contact, or where there is an intervening space, however small, between them. Now, it is so well settled as to be treated almost as an axiom in natural philosophy, that no two particles of matter actually touch each other, and that there is always an intervening space between them. *The defendant's liability must, therefore, be confined to the particular particle or particles of matter which actually first caught fire, and the whole conflagration resulting, not only of the remainder of the particular board or shingle, but of the house, must be treated as a new consequential injury too remote to serve as a safe ground of damages.* This, it may be said, is unreasonable, and ludicrously absurd; and so it is; *but it is slightly more absurd or ludicrous than it would be to hold that defendant's liability must be limited to the first building burned,* because the

> others were not a part of it, or in actual contact with it, but five or six feet distant. * * * I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first, were five, six, or fifty feet, or the one-hundredth part of an inch from it" (Italics ours).

This Court, after reaching the conclusion that a spread fire originally started by earthquake, after it has spread from its point of origin, ceases somewhere along the line to be "directly" caused by the earthquake and becomes "indirectly" caused thereby, does not experience the difficulty that the Court found in the Hoyt case, supra, but arbitrarily says that it will hold that the earthquake, to be the direct cause of the fire, must cause such fire on the insured premises. It would, we submit, be entirely as logical as shown by the Court in the Hoyt case, supra, to limit the insurer's exemption to the loss to the first square inch or to the first square foot burned by a fire started on the insured premises.

In Insurance Company v. Tweed, 7 Wall. 44, the Court said:

> "The fact that it (the fire) was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new *cause.*"

It will be noticed that in this discussion the Court says that the spread of the fire constituted "*no new*

"*force* or power which *caused* the burning". If, then, the premise is correct, and the Supreme Court has thus held that it is, that the fact of the spread of fire supplies no new cause, it must follow as a necessary conclusion from this premise that the original cause of the fire is the *sole cause,* and if such *original cause* is the *direct cause* when the fire is started, it must remain the *direct cause* all along the line of the spread of the fire; and cannot become the *"indirect cause".*

Having reached the conclusion that a fire to be directly caused by earthquake must be caused upon the premises insured, the Court in seeking a reason to justify such a conclusion says:

> "It evidently was not the intention of the contracting parties that the insured was to answer for the default of others whose buildings might be improperly constructed or defectively wired or by reason of the purposes for which they were used were specially subject to fire by the disturbing agency of an earthquake."

It does not appear, however, either from the opinion itself or otherwise how it is *so evident* that the intention of the contracting parties was as stated. And such a method of construction has not received the approval of the Supreme Court.

In *Insurance Company v. Express Company,* 95 U. S. 227, a policy, issued to the Express Company, insuring goods and merchandise in its care for transportation, contained the following provision:

"No loss is to be paid arising from petroleum or "other explosive oils." The train upon which the insured goods were carried collided with another train which had petroleum on board and this petroleum, igniting, caused a disastrous fire which burned the goods insured. It was argued on behalf of the insured that the exemption did not apply for the reason that the intention of the parties was that the clause meant: "no loss is to be paid for loss aris- "ing from petroleum or other explosive oils *carried "by the parties insured"* or *"carried upon the same "train of cars or other conveyances used by the "parties insured".*

But the Supreme Court in overruling that contention said:

> "But such a construction would be making a contract instead of interpreting one already made."

In *St. Louis &c. Ry. v. Com. Ins. Co.,* 139 U. S. 222, the Court understands as to causation that direct and proximate mean the same thing. As to whether a certain negligent act was or was not the cause of a fire the Court said (p. 237): "Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire and did not make the defendant responsible for that loss to the owner of the cotton or to their insurers."

This Court, both by its ruling to the effect that "caused directly" is equivalent to "caused

on the insured premises" and by its reason given in justification of such ruling that it was the intention of the parties that the insured should not be answerable for the default of others in so maintaining their premises as to increase the risk of fire by earthquake, has "made a contract for the parties " and has not interpreted one already made".

The Supreme Court has furnished the rule for the interpretation of an exemption clause, where several different perils are excepted, in *Insurance Co. v. Tweed,* supra, where, in relation to the excepted peril explosion, which was one of a number of excepted perils, the Court said:

> "* * * in establishing a principle applicable to fire originating by explosion, we must find one which is equally applicable under like circumstances to the other causes embraced in the same clause."

This being the rule of construction announced by the highest federal Court, can the reason given by this Court for its limitation of the meaning of the word "directly" with reference to earthquake be sound, when the same reason cannot be applied for such limitation with reference to the excepted peril of volcano in the same clause? For it cannot be intelligently said that the default of any one can increase the risk from volcano-caused fire. The Court has held, not only that the peril of earthquake to be the direct cause of a fire must cause such fire on the insured premises, but has construed the

excepted peril of volcano in the same way. It does not appear, however, in what way a volcano could cause a fire on the insured premises unless the insured premises were located in the crater. Of course a volcano might emit a glowing rock that might alight on the insured premises located at some distance from the volcano, but in such a case the volcano would not be the direct cause of the fire under the Court's ruling, because, the fire thus caused would have spread through the intervening space.

The single fact that the construction given by the Court to the exemption clause would, when applied to the excepted peril of volcano lead to an absurd result is sufficient to show the inherent unsoundness of such construction.

The unsoundness of the conclusion of the Court that the earthquake exemption must be limited to the single case where the fire is caused by the earthquake "on the insured premises", is also significantly shown by the fact that, as appears from the record in the case, the "insured premises" were goods situated in a brick building. Now, while the record does not show it, the fact is that the goods insured were contained in a room 37x45 feet in a large eight story brick building and such building was neither owned by nor under the control of the insured. What then is the result of the Court's construction of the earthquake exemption as applied to the particular state of facts in this cases? Sup-

pose that the earthquake, by reason of defective electric wiring installed by the owner of the building in the room in which the goods were contained had started a fire in the goods themselves. Such a fire would be started on the "insured premises", but, nevertheless, under the Court's ruling the insurer would not be exonerated from liability, because, the Court says: "It was evidently not the "intention of the parties that the insured was to "answer for the default of others whose build- "ings might be defectively wired." Suppose that the earthquake had knocked over a lamp in a room adjoining the room in which the insured goods were contained and such fire immediately spread to the latter room. Nevertheless, under the Court's ruling, the insurer would be held liable because the fire did not start on the insured premises. Or to pursue the matter still further, suppose that the insured himself had lighted a lamp in the very room in which the goods were located, such lamp being at a distance of a few inches from the goods and that the earthquake had knocked over such lamp setting the floor of the room on fire and such fire had then spread along the floor until it reached the goods insured and destroyed them; nevertheless such a loss would not be within the exception as construed by the Court, because the fire was not started on the "insured premises", although the agency which was operated on

by the earthquake to start the fire was under the control of the insured.

Surely the construction which the Court has put upon the earthquake clause cannot be sustained when, if applied to the facts in the case, such construction would absolutely emasculate the exception, for, under the ruling, the insurer would be exonerated only in the single case in which it could be shown not only that the earthquake had started the fire upon the goods themselves, but also that the agency operated upon by the earthquake to start the fire was within the control of the insured. Manifestly when the construction put upon the clause by the Court logically leads to these curious results it must be held that the word "directly" when used with a causative verb is equivalent to "proximately", and that a fire started by earthquake is, as long as it burns through intervening space, at all times one and the same fire and that if it is "directly" caused by earthquake at its initial starting point, it is "directly" caused by that peril as long as the fire burns, and there is no intervening cause.

In our closing brief we cited numerous authorities to the effect that the word "directly" as used in the policy in suit means proximately. In the opinion filed neither the argument nor the cases cited are noticed, and, fearing that by reason of the pressure upon its time both argument and cases escaped the notice of the Court, we again call attention thereto.

In the first place, it is a cardinal rule of construction that when a word is used in a contract and the parties in such contract have placed a particular meaning thereon, then, if such word occurs subsequently in the contract, the same meaning must be given to that word. As was said by Sanderson, C. J., in Saunders v. Clark, 29 Cal. 229, 305:

> "Where it is apparent that the parties to a contract have attached to certain words or expressions a particular meaning, it must be presumed, nothing to the contrary appearing, that the same meaning was intended wherever like words or expressions are subsequently employed."

Now the word "direct", as used in the insuring clause, agreeing to indemnify "against all direct loss or damage by fire" is equivalent to "proximate" for the parties have by the contract placed this meaning upon that word. And this being so when the word "directly" is subsequently in the exemption clause used in the same sense as the word "direct" in the insuring clause, i. e., to express causation, the same meaning must be given to the word "directly" as the parties themselves have placed upon the word "direct".

In the exemption clause contained in the policy the insurer has exempted itself from loss caused by theft; by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire; and from loss by explosion. If the word "direct" as used in the insuring clause means

anything less than "proximate" then the insurer must be convicted of having exempted itself from liability from fire loss caused by those perils, for which it could not have been held liable even in the absence of such exemption, for it will not be contended that fire is anything less than the "proximate" cause of loss caused by the perils referred to.

And following the exemptions from the perils last enumerated this provision occurs in the policy: "This company shall not be liable * * * be- "yond the actual value destroyed by fire for loss "occasioned by ordinance or law regulating the "construction or repair of buildings, or by inter- "ruption of business, manufacturing processes or "otherwise." This specific exemption therefore from liability for loss occasioned by these perils does conclusively show that, by the use of the phrase "direct loss or damage by fire", both the insured and the insurer considered that thereby the insurer would be liable for all loss proximately caused by the peril insured against: for it is apparent that fire loss occasioned by the excepted perils above mentioned cannot be less than proximately caused by the peril insured against.

And there is still another provision of the policy showing the construction which the parties to the contract have themselves placed upon the word "direct" as used in the insuring clause. This provision is: "This company shall not be liable under "this policy for a greater proportion of any loss on

" the described property, or for loss by or expense " of removal from premises endangered by fire, " than the amount hereby insured shall bear to the " whole insurance". By this provision then the parties have admitted that although the insurance was against "direct loss or damage by fire", nevertheless the company would be liable in the proportion that the insurance by the policy should bear to the whole insurance for loss by or expense of removal from premises endangered by fire; and it cannot be seriously contended that loss caused by removal of goods from premises endangered by fire, when fire does not touch the goods, is anything less than proximately caused by the peril insured against.

As was said by the Supreme Court of Georgia, in *Insurance Co. of North America v. Leader*, 48 S. E. 972:

> "In this case, however, in addition to what has been said above, we have the construction which the parties themselves placed upon the phrase 'all direct loss or damage by fire', and we find that even the insurers, by a subsequent provision inserted in the contract, gave to this phrase a construction sufficiently broad and liberal to include 'loss by and expense of removal from premises endangered by fire'. It is to be observed that the provision to which we now refer does not declare that in addition to the liability expressed by the words 'all direct loss or damage by fire', the insurance companies shall be liable for 'loss by and expense of removal from premises endangered by fire', but in limiting the amount of any liability of these

> insurers in the event the property is also insured in other companies there is an incidental recognition and acknowledgment by the insurers of such liability under the original words. It is not, as counsel for the plaintiff in error contend, an express modification and enlargement of the natural meaning of the words 'direct loss or damage by fire', but simply amounts to an acknowledgment that under the original language the insurers would be liable for such loss and expense."

And the Court held that "direct" meant exactly the same thing as "proximate".

In *Ermentraut v. Ins. Co.,* 63 Minn. 305, a policy insured against "direct loss or damage by fire" to a certain warehouse. Fire weakened a wall adjoining the warehouse and the wall fell, damaging the warehouse, but fire itself did not touch the premises insured. The insurer was nevertheless held liable, the Court holding that the word "direct" as used in the insuring clause meant "proximate" and that such loss was proximately caused by the peril insured against.

In *Elliott on Insurance,* Sec. 211, the author says of the word "direct" as used in the insuring clause:

> "The word 'direct' means merely the immediate or proximate as distinguished from the remote cause."

But not only have the parties themselves, in the contract, and the courts, construed the word "direct" in the insurance clause as being equivalent to "proximate", but the courts have also construed the

words "direct" and "proximate" to mean exactly the same thing when used to express causation whether in a policy of insurance or otherwise.

In *Bradlie v. Insurance Company,* 12 Pet. 378, 403, the U. S. Supreme Court in discussing the measure of the liability of a marine insurer said:

> "The underwriters engaged to pay the amount of the expenditures and losses *directly* flowing from the perils insured against. * * * The maxim here, as in many other cases in the law, is, *causa proxima non remota, spectatur".*

In the G. R. Booth, 171 U. S. 450, a bill of lading under which certain sugar of the libelant was carried, contained a provision exempting the carrier from liability for loss by the perils of the sea or other waters. An explosion occurred on the ship which made a large hole in the side thereof through which the sea water entered the hold and damaged the sugar. The question, under this state of facts, certified by the Circuit Court of Appeals of the Second Circuit, was whether the damage to the sugar was within the exception of the bill of lading. The Supreme Court stated the question as follows:

"Whether it is the explosion, or a peril of the sea, that is to be considered as the *proximate* cause of the damage, according to the familiar maxim *causa proxima, non remota, spectatur".* (Italics ours.)

In answer to this question the Supreme Court held that the explosion and not a peril of the sea

was the proximate cause of the damage to the sugar. It will be noticed that under these facts the explosion made a hole in the ship and thus allowed the sea peril to operate. The explosion was in no sense anything less than the *proximate* cause of the loss. But the Supreme Court held that it was nevertheless the *direct* cause of the loss and used the words "direct" and "proximate" as synonymous. The Court said:

> "As was observed by this court in Ins. Co. v. Boon, above cited: 'Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames; yet, it is not doubted, all that destruction is caused by the fire, and insurers against fire are liable for it. (95 U. S. 131.) If damage done by water thrown on by human agency to put out a fire, is considered a *direct* consequence of the fire, surely damage done by water entering instantly by the mere force of gravitation, through a hole made by an explosion of part of the cargo, must be considered as a *direct* consequence of the explosion. Upon principle and authority, therefore, our conclusion is that the explosion, and not the sea water, was the proximate cause of the damage to the sugar, and that this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading". (Italics ours.)

In *Lynn Gas & Electric Co. v. Ins. Co.,* 158 Mass. 570, a policy insured against loss by fire a building, machinery, dynamos and other electrical machinery; a fire occurred which produced a short circuit in machinery located in a part of the building remote from the fire; it was nevertheless held by the Court

that the fire was the "direct and proximate cause" of the damage to the machinery. The Court said:

> "The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the *direct* and *proximate* cause referred to in the cases, McDonald v. Snelling, 14 Allen 290; Perley v. Railroad Co., 98 Mass. 414, 419; Gibney v. State (N. Y. App.) 33 N. E. 142. * * * The fire was the direct, proximate cause of the damage, according to the meaning of the words 'direct and proximate cause' as interpreted by the best authorities".

In *Texas & P. Ry. Co. v. Coutourie,* 135 Fed. 465, the Circuit Court of Appeals for the Second Circuit, squarely held in a case where the point was distinctly raised, that the words "direct and proximate" when used as modifiers of "cause" mean the same thing. In that case the question presented to the appellate Court was with reference to the trial Court's charge to the jury. In upholding a portion of the charge the Court said:

> "The kind of negligence which contributed *directly* and *proximately* to the loss of the cotton, and 'was the *direct* cause of the loss' and 'directly resulted in the destruction of the cotton' would be to the mind of the average juror the immediate and efficient cause and therefore the *proximate* cause."

In addition to the foregoing it has been held in a well considered case that where the words "directly or indirectly" are used to qualify the causative verb in an exemption clause in a policy of insurance, the

insurer is thereby exempted from liability for loss either "proximately" or "remotely" caused by the excepted peril. We refer to the decision in *Manufacturer's Accident Indemnity Co. v. Dorgan,* 58 Fed. 945, in which case the Circuit Court of Appeals for the Sixth Circuit had occasion to pass upon a provision in an accident insurance policy exempting the insurer from liability for death caused "directly or indirectly by disease". It appears from the facts in that case that the insured, either on account of disease or some temporary cause of like nature, fell into a body of water and was drowned. It was held that the proximate cause of the death of the insured was the drowning and not the disease. But it was further held that under the provision that the insurer should not be liable for death caused directly or indirectly by disease, the insurer could go back of the proximate cause, the drowning, and if the death was remotely caused by the disease, it was not liable. Judge Taft who delivered the opinion in the case, after referring to the cases of Winspear v. Ins. Co., 6 Q. B. Div. 42, and Lawrence v. Ins. Co., 7 Q. B. Div. 216, said:

> "These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the Supreme Court in case of Ins. Co. v. Crandall, 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death. We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo,

> or any disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease'. In our opinion, the adjective 'accidental' qualifies not only 'injuries', but also 'death', and therefore an accidental death by drowning does result from, *and is caused indirectly by fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease.* The exception is broader than the exceptions in the policies considered in the Winspear and the Lawrence cases, and is made so by the use of the word '*indirectly*'. As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence case, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable." (Italics ours.)

In the face of these authorities, can a ruling be sound which limits the meaning of the word "directly" to something less than "proximately"? Even if we should concede, contrary to the fact, that the word "directly" might be construed to be less comprehensive than "proximately" when used with a causative verb, nevertheless, the word must be held in this case to be equivalent to "proximately", under the familiar rule of construction that every word in a contract must, if possible, be given effect.

This Court says that "occasioned by or through", is equivalent to "caused by" and that "occasioned by or through" standing alone, and unrestricted by other provisions of the policy, would cover a fire

caused by earthquake either on the insured premises, or elsewhere; therefore the Court has held that "caused by" covers a fire caused by earthquake on the insured premises or elsewhere and, in effect, has thus held that the words "directly or indirectly" found in the first subdivision of the earthquake clause are mere surplusage; for these words have been construed by the Court to mean "on the insured " premises or elsewhere", and the Court also holds that "caused by" alone would cover a fire caused on the "insured premises or elsewhere".

Finally, upon the point under discussion, must it not be held that the words "directly and indirectly" found in the policy are to be given the meaning placed upon them by judicial decision? It having been judicially determined that "direct" is equivalent to "proximate", and, therefore, that "directly" is synonymous with "proximately" must it not be presumed that in using these words the parties intended them to have the meaning thus judicially put upon them? We understand this to be the rule.

Cooley, Insurance Briefs, Vol. 1, p. 644;
Bargett v. Orient Mutual Ins. Co., 16 N. Y. Sup. Ct. (3 Bosw.) 385;
Lowenstein v. F. & C. Co., 88 Fed. 474;
T. & C. Co. v. Lowenstein, 97 Id. 17;
F. & C. Co. v. Waterman, 161 Ill. 632; 44 N. E. 283.

IV.

WALKER V. LONDON & PROVINCIAL INS. CO., 22 Irish Law Times, 84, ALTHOUGH SOUGHT TO BE DISTINGUISHED BY THIS COURT, IS SQUARELY OPPOSED TO THE RULING MADE.

It is difficult to appreciate the distinction made by this Court between the Walker case and the case at bar. This Court, speaking of that case, says:

> "No expression was used to show the intention to limit the exemption to incendiarism committed on the property described in the policy. This was expressly held in the opinion."

But the Court does not attempt to distinguish the ruling in that case upon the meaning of the word "directly" which ruling is squarely opposed to the fundamental proposition upon which the decision in the case at bar rests.

While finding that in the Walker case no expression was used to show intention to limit the exemption, this Court fails to notice and refuses to consider the fact that that case is authority to the proposition that, as stated by that Court, "incendiarism " as used in the policy excluded any act of incendi- " arism *wherever committed* which *directly* caused " the loss or damage sued for".

The Court in the Walker case after considering the exemption clause construed that clause to be comprehensive only of *loss directly by incendiarism.* The insurance in that case was upon goods and the act of incendiarism was committed in a building

other than the one in which such goods were located. It was admitted that the fire caused by the incendiarism spread to and burned the building of the plaintiff and thereafter burned the goods insured. And upon these facts the Court held as a matter of law that, although the exemption clause should be limited in its scope to cover only loss *directly* by incendiarism, the loss to the goods was *directly* caused by the act of the incendiary.

Said Palles, C. B.

> "Upon the grounds, and being myself clearly of the opinion that had the question been left to the jury they ought to have found that Henry M.'s act was the *direct* cause of the loss sued for, I am coerced to hold that both the questions suggested in the argument must be ruled in favor of the defendants, and consequently the verdict must be entered for them."

It is interesting to note that in the Walker case the Court sought to find some method of construction whereby it could nullify the exception, but the proposition that a fire started by incendiarism is at all times one and the same fire and when so started is *directly* caused by that agency no matter how far it burns, and *directly* causes the loss to whatever building may be destroyed in the course thereof, seemed so clear to the Court that, as Palles, C. B., said:

> "I am *coerced* to hold that both the questions suggested in the argument must be ruled in favor of the defendants"; and that Dowse, B., said: "It is *hardly possible* to read the words

of the policy in connection with the facts of the present case and come to any other conclusion."

It is also interesting to note that Palles, C. B., said, evidently in answer to the argument that although a provision of a policy is clear, nevertheless such provision should never be construed to limit indemnity:

"It has been said that this is a very hard case; but we cannot allow the doctrine to prevail that hard cases make bad law."

And Dowse, B., said:

"I would rather come to a different conclusion but though hard cases make bad law we must do our best to prevent bad law making hard cases which we would do here if we came to any other conclusion than what the Chief Baron has announced."

V.

THE BOON AND TWEED CASES HAVE BEEN MISCONSTRUED BY THE COURT.

The Court in its opinion, after citing these decisions of the Supreme Court, cites the case of Scheffer v. Railroad Co., 105 U. S. 249, together with the statement of Mr. Justice Miller in that case, that the Tweed case

"went to the verge of sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama Warehouse but it rested on the ground that no other proximate cause was found".

It is not apparent from the Court's opinion for what purpose this extract from the Scheffer case was made unless it desired thereby to intimate that the Supreme Court had cast doubt upon the doctrine announced in the Tweed case. If this was the purpose of the citation of the Scheffer case, it may be remarked that the Supreme Court has in a late case cited, fully approved, and directly applied the doctrine announced in the Tweed and Boon cases.

The G. R. Booth, 171 U. S. 450.

The Circuit Courts of Appeals in other circuits, have not considered that the Supreme Court has in subsequent cases in any manner receded from or limited the doctrine announced in the Boon and Tweed cases.

Ins. Co. v. Bridge Co., C. C. A. 4th Cir., 65 Fed. 628;

Goodlander Mill Co. v. Standard Oil Co., C. C. A. 7th Cir., 63 Fed. 400;

Cole v. German Savings & Loan Society, C. C. A. 8th Cir., 124 Fed. 113;

Demolli v. United States, C. C. A. 8th Cir., 144 Fed. 363;

"The Frey", C. C. A. 2nd Cir., 106 Fed. 319;

American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co., C. C. A. 7th Cir., 57 Fed. 294.

In stating the doctrine announced by the Tweed and Boon cases this Court says: "It is the doctrine " of these decisions that if the excepted cause pro-

" duces a fire in property *near* the property insured " and the fire is communicated to the latter by " natural causes the excepted cause is the proximate " cause of the loss, and that the exceptions contained " in the policies in those cases, *phrased as they were* " were sufficiently broad to exclude liability for loss " by fire caused either directly or indirectly by agen- " cies so specified".

But there is nothing said in either of these cases by the Supreme Court which in any way justifies the statement that in those cases the Court limited the doctrine announced therein to fire caused by the excepted peril *near* the property insured; nor is there anything said by the Court with reference to the particular phraseology of the exceptions contained in the policies.

In the Tweed case the Court said:

> "The fact that it (the fire) was carried to the cotton by fire burning another building *supplies no new force or power* which caused the burning. *Could it be held as necessary to exemption that the persons engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case, if half the town had been burned down the company would have been liable* for *all the buildings insured, except the one first fired? Or if a hurricane or earthquake had started the fire is the exemption limited in the same manner?* These propositions cannot be sustained."

Can it be said in the face of this express ruling by the Supreme Court that the spread of the fire

supplied no new force or power which caused the burning, and that the proposition that if half the town had been burned down the company would have been liable for all the buildings insured except the one first fired "cannot be sustained", that the Supreme Court intended to limit the application of the doctrine announced therein with relation to spread fires to cases where the excepted peril starts the fire *near* the insured premises?

Nor did the Court in either the Tweed case or the Boon case make any reference whatsoever to the phraseology of the exemption clause contained in the policy. The sole question considered by it was whether or not the excepted perils were the *proximate cause* of the loss.

This Court in effect holds that upon the facts in the Tweed and Boon cases these losses by fire were indirectly caused by the excepted perils; but the language of the Court in the Boon case is conclusive against this holding for the Supreme Court ruled in that case that the meditated attack on the part of the Confederate forces was not only the proximate cause of the loss to the insured premises but was the *direct cause thereof*. In the Boon case the Court cites, and fully approves, *Butler v. Wildman*, 3 B. & A. 398, saying of that case,

> "The captain of a Spanish ship, in order to prevent a quantity of Spanish dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea. The suit was upon a policy insuring the

> dollars and judgment was given for the plaintiff. Bailey, J., said * * * 'It seems to me therefore this is a loss by jettison. But if it is not a loss by jettison, it is a loss by enemies. It clearly falls within the principle stated by Emerigon in the case of the destruction of a ship by fire; and I think the enemy was the proximate cause of the loss'. Holroyd, J., said 'it seemed to him it was a loss by enemies, for the meditated attack was the *direct cause* of the loss''.

Further on the Court says in its opinion:

> ''His act therefore in setting fire to the City Hall was directly in line of the force set in motion by the usurping power''.

It clearly appears therefore that in the Boon case the Court considered that the meditated attack upon the part of the Confederates was the *direct cause* of the loss by fire to the building insured.

The Circuit Court of Appeals of the Second Circuit in *Texas & Pac. Ry. Co. v. Coutourie,* 135 Fed. 465, has not considered that in the Boon case the excepted peril was the *indirect* cause of the loss but has held, on the contrary, that the excepted peril was the *direct* cause of the loss and that ''direct'' and ''proximate'' are synonymous when used to express causation. The Court said:

> ''A proximate cause is one from which the injury follows as a *direct* and immediate consequence. It is the dominant cause—the one that necessarily sets the other causes in operation. Cooley on Torts, 73; Ins. Co. v. Boon, 95 U. S. 117; 24 Law Ed. 395''.

VI.

HUSTACE V. INSURANCE COMPANY, 175 N. Y. 232 (67 N. E. 592) AND GERMAN FIRE INS. CO. V. ROOST, 45 N. E. 1097, HAVE BEEN MISCONSTRUED.

While the Court says, with reference to these cases, merely that "assistance has been found in the "principles announced" therein, it is evident that they are cited in support of the Court's ruling that a fire to be directly caused by a peril must be caused by such peril on the insured premises.

In stating what was held in these cases this Court has followed the construction put upon them by the defendant in error in his reply brief; and we must presume was influenced to some extent by reason of the supposed authority for the views expressed in reaching its conclusion by the misconstruction of these cases by defendant in error. We do not wish to be understood as asserting that defendant in error wilfully intended to mislead this Court but we do assert that a construction was put upon the cases referred to by defendant in error which a careful reading thereof shows is unwarranted.

This Court says:

> "In Hustace v. Ins. Co., 175 N. Y. 292, the policy provided for liability only for loss directly caused by fire. A fire caused an explosion which blew down the insured premises, which were located a short distance from the place of explosion. The court held that the direct cause of the loss was the explosion, and that there could be no recovery on the policy."

But the Court in the Hustace case held nothing of the kind. In that case the insurance was against all direct loss or damage by fire. The policy also contained an exception to the effect that insurer would not be liable for loss caused by explosion. A fire caused an explosion which damaged a building and recovery was sought for the pure concussion damage upon the ground that as the fire was the proximate cause of the ultimate loss the insurer was liable under the insuring clause. The Court held the company not liable upon the theory that insurance was against loss by fire direct, i. e., against loss by the *burning* of the insured property.

Of German Fire Ins. Co. v. Roost, 45 N. E. 1097, the Court says:

> "The insurance excluded loss by explosion unless fire ensued but specially insured against loss or damage by lightning. Lightning struck a powder magazine on the opposite side of the street and caused an explosion which wrecked the insured property. It was held that the loss was caused by explosion and not by lightning and that the insurance company was liable."

This case, however, did not hold that the loss was caused by explosion and not by lightning. The Court refused to consider whether the lightning or the explosion was the cause of the loss, saying

> "and it seems not worth while to pursue the point (as to which peril was the cause of the loss) in considering the present case, because as it appears to us there is no necessity for such inquiry, inasmuch as the case may be satisfactorily disposed of on the second proposition",

and then placed its decision squarely upon the ground that the insurer having exempted itself from loss by explosion, it was immaterial what peril caused that explosion. The Court said:

> "Construed with reference to the subject matter the language used is equivalent to a declaration upon the part of the company that it will not be held liable for any loss *whether it comes within the general peril of lightning or not.*"

We submit, therefore, that these two cases, with reference to which this Court says it has received assistance, are not authority for the proposition to which they are cited. But even if the fact were otherwise these decisions cannot be helpful in this Court for the reason that the Supreme Court of the United States lays down the rule the other way.

The G. R. Booth, 171 U. S. 450.

In the case cited a bill of lading, under which certain sugar of the libelant was carried, contained a provision exempting the carrier from liability for loss by the perils of the sea or other water. An explosion occurred on the ship which made a hole in the side thereof through which the sea water entered the hold and damaged the sugar. The question certified to the Circuit Court of Appeals for the Second Circuit was whether the damage to the sugar was within the exception of the bill of lading and it was held that the explosion and not the excepted peril was the proximate cause of the damage to the sugar. Here we have an excepted

peril as the immediate cause of the loss but the ruling was that the proximate cause was that which brought the excepted peril into operation and not the excepted peril itself.

Furthermore, in relation to the two cases referred to in the opinion, it is to be observed that the great weight of authority throughout the country holds the rule to be as stated in The G. R. Booth case. As to this see

Cooley, Briefs on Insurance, Vol. 4, p. 3027,

and the numerous authorities cited in the foot note to that page.

VII.

THIS COURT WAS MISLED BY THE INCORRECT STATEMENT OF DEFENDANT IN ERROR AS TO WHAT WAS DECIDED IN MICHIGAN F. & M. INS. CO. V. WHITELAW, 23 OHIO CIRCUIT 197.

In the opinion first filed in this case the Court said:

> "In Michigan F. & M. Ins. Co. v. Whitelaw, 25 Ohio Circuit 197, the exception in the policy was for loss directly caused by riot or incendiarism. It was held it did not exclude liability for loss by fire communicated to the insured building from another building set on fire by rioters or incendiaries".

We understand that after the original opinion was filed, the attention of the Court was called to

the fact that the case referred to was not authority for the proposition stated, but that it had been conceded in that case by and between the parties that the rule to be applied was the same as if the building insured had been set on fire by the rioters. In our closing brief, (which this Court by express order permitted the plaintiff in error to file), at p. 45 thereof, we called the attention of the Court to the fact that the Whitelaw case had been misstated but this apparently was overlooked and hence the error into which the Court fell.

Now, if the Court had not fallen into that error upon what other case referred to in the briefs, or cited in the opinion, could the ruling rest that the word directly, as used in the policy, means "on the "insured premises"? There is no other authority referred to which in the remotest degree tends to support that proposition. We are confident that if the Court had not accepted as correct the erroneous construction put by defendant in error upon the Hustace and Roost cases, referred to in the last subdivision of this petition, and had not similarly accepted as correct the erroneous statement of defendant in error as to what was decided in the Whitelaw case it could not, in the light of the numerous cases cited in our closing brief, and to some of which we have referred in this petition, without disregarding those cases, have reached the untenable conclusion that the word "directly" as

used in the exemption clause, is the equivalent of "on the insured premises".

VIII.

STANDARD LIFE & ACCIDENT INS. CO. V. McNULTY, C. C. A. 8TH CIRCUIT, 157 FED. 224.

We take the liberty of again calling the attention of the Court to this case and to the argument in our opening brief based thereon. The Court rendering that decision is one of high standing, and the case upon all-fours with the one in hand, and the conclusion reached, unless it can be shown to be unsound, conclusive of our right to a reversal. Neither the case nor the reasoning thereof is noticed in the opinion filed herein. We respectfully submit that if plaintiff in error is wrong as to its understanding of this decision it should be informed in relation thereto.

In his attempt to distinguish the McNulty case from the case at bar counsel for defendant in error stated in his brief (p. 70) "that case, however, is not " in point for the reason that the word 'injuries' " *necessarily* includes injuries of all kinds. There " is no room for construction. But a provision in " a policy of fire insurance that the insurer shall not " be liable for loss caused or occasioned by earth- " quake does not *necessarily* cover a case where the " loss results *indirectly* from earthquake, that peril " being but a link in the chain of causation pro-

"ducing the loss". Now this Court has held that "occasioned by or through", standing alone, would cover a fire directly caused by earthquake (i. e. "On the insured premises") or a fire indirectly caused by that peril (i. e. by a spread fire) and that "occasioned by or through" is equivalent to "caused by". Therefore this Court has held, against the contention of defendant in error, and that "caused by" standing alone is inclusive of "caused directly or indirectly". Therefore this Court has held that the two clauses standing alone mean exactly the same thing, but that, when read together, the second clause means something different from the first clause, whereas in the McNulty case the Court held that the two clauses standing alone each meant the same thing and that the fact that they were both used in the exemption clause could not change the meaning that each clause had standing by itself. The decision in the McNulty case cannot be reconciled with that in this case, and we submit that the ruling in the Eighth Circuit should have been followed.

If the Court shall be of the opinion that a rehearing should not be granted in this case we ask that upon making that ruling an order be issued staying the issuance of the mandate for such time as will enable plaintiff in error to apply to the federal Supreme Court for certiorari, which will be immediately done.

T. C. Van Ness,
Attorney for Petitioner.

T. C. Van Ness, being the counsel for the within named petitioner, Williamsburgh City Fire Insurance Company of Broklyn, New York, does hereby certify that, in his judgment, the foregoing petition for rehearing is well founded; and does hereby further certify that said petition is not interposed for delay.

T. C. Van Ness,
Attorney for Petitioner.